(8)

No. 92-1

In The

Supreme Court of the United States

October Term, 1992

LYNWOOD MOREAU, *et al.*,

Petitioners,

v.

JOHNNY KLEVENHAGEN, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENTS

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39 pp

QUESTION PRESENTED

In response to the court's decision in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), Congress enacted Section 7(o) of The Fair Labor Standards Act. Subsection 2(A) of that section provides as follows:

> A public agency may provide compensatory time [. . .] – pursuant to –
>
> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work . . . [29 U.S.C. §207(o)(2)(A)].

Respondent Harris County, Texas is a local governmental entity that is prohibited by state statute from entering into collective bargaining agreements with or otherwise recognizing employee organizations or representatives. The true question presented to this court is whether the provisions of Section 7(o)(2)(A) were intended to preempt or contravene such state legislative proscriptions by compelling a state or local government to recognize and bargain with employee representative groups in order to compensate employees for overtime with compensatory time off in lieu of cash?

PARTIES TO THE PROCEEDING BELOW

Plaintiffs/Appellants/Petitioners are listed in the Brief for Petitioners.

Defendants/Appellees/Respondents are Johnny Klevenhagen, Sheriff of Harris County, Texas and Harris County, Texas.

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STATEMENT OF THE CASE

1. In response to this Court's holding in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), Congress enacted The Fair Labor Standards Amendments of 1985 which contain, among other provisions, Section 7(o) of The Fair Labor Standards Act of 1938, as amended (hereinafter referred to as "the FLSA"). Subsection 2(A) of that section sets forth the method and the conditions under which states, counties and cities may compensate their non-exempt employees for overtime hours worked with compensatory time off in lieu of cash. Section (7)(o)(2)(A), codified in 29 U.S.C. §207(o)(2)(A), provides

in relevant part that a public agency, *i.e.* a state, county, city, or local government, may provide compensatory time to its employees "only pursuant to (i) applicable provisions of a collective bargaining agreement, memorandum of understanding or any other agreement between the [state, county or city] and representatives of such employees; or (ii) *in the case of employees not covered by subclause (i),* an agreement or other understanding arrived at between the employer and employee before the performance of the work. 29 U.S.C. §207(o)(2)(A)(i) and (ii) (emphasis added).

2. Respondent Harris County, Texas, (hereinafter referred to as "Respondent County" or "the County") is a political subdivision organized under the laws of the State of Texas and has been the employer of the individually named Petitioners. (J.A. 29)[1].

3. Respondent Johnny Klevenhagen (hereinafter referred to as "the Sheriff" or "Respondent Sheriff") is the duly elected and qualified sheriff of Respondent County. (J.A. 22, 29). Under the provisions of state law, the Sheriff has the power to appoint deputy sheriffs serving in Harris County, Texas. (J.A. 29). When the Sheriff assumed office in January of 1985, he appointed each of the individually named Petitioners to be a deputy sheriff. *(Id.)*

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[1] References to the Joint Appendix are by page number and are abbreviated "J.A.". References to the Appendix to the Petition for a Writ of Certiorari are by page number and are abbreviated "Pet. App.". References to the Appendix to the Brief in Opposition to the Petition are by page number and are abbreviated "Br. Opp. App.". References to the Record are by the particular document and page number assigned to the document by the Clerk of the District Court.

4. Respondent County, acting through its Commissioners Court, is the budgetary authority for expenditures of the Sheriff and other elected officials. (J.A. 30). The Commissioners Court of Respondent County must approve funds used for payment of deputy sheriffs' salaries. (*Id.*). It may not, however, influence the Sheriff's selection of the individuals to fill the budgeted deputy positions. (*Id.*).

5. Sections 1 and 2 of Article 5154c of the Revised Civil Statutes of Texas state:

> **Art. 5154c. Public employees collective bargaining contracts with organizations representing; strikes; loss of civil service and other rights**
>
> Sec. 1. It is declared to be against the public policy of the State of Texas for any official or group of officials of the State, or of a County, City, Municipality or other political subdivision of the State, to enter into a collective bargaining contract with a labor organization respecting the wages, hours, or conditions of employment of public employees, and any such contracts entered into after the effective date of this Act shall be null and void.
>
> Sec. 2. It is declared to be against the public policy of the State of Texas for any such official or group of officials to recognize a labor organization as the bargaining agent for any group of public employees.

TEX. REV. CIV. STAT. ANN. art. 5154c §§1, 2 (Vernon 1987). (Br. Opp. App. 1a).

6. Respondent County, through its Commissioners Court, was never notified that any particular deputy sheriff desired to enter into an agreement with it with respect to the payment of cash for overtime hours worked. (J.A. 30). Respondent County has not entered into any collective bargaining agreement with any union nor with any employee representative organization since no union has complied with the provisions of TEX. REV. CIV. STAT. ANN. art. 5154c-1 §5(b) (Vernon 1987). These provisions require voter approval before a city or county may recognize and bargain collectively with representatives of firefighters and police officers. (J.A. 30).

7. Respondent Sheriff was never notified verbally or in writing that Local 154 of the Harris County Deputy Sheriff's Union represented deputies who desired to reach an agreement on the subject of overtime compensation. (Exhibit 2 to Defendants' Motion for Partial Summary Judgment, R. 138-9).

8. On December 7, 1985, Commissioners Court of Harris County enacted an overtime compensation policy in its personnel regulations. Sections 7.01, 7.02, 9.01, and 9.04 of that policy state as follows:

> 7.01 Effective December 7, 1985, and based on available budgeted funds allocated to a line item for overtime compensation, non-exempt employees shall be compensated for hours of actual work in accordance with applicable federal and state statutes, rules, and regulations regarding overtime compensation for County employees.
>
> 7.02 In lieu of payment for overtime work, compensatory time may be allowed.

> 9.01 For each workweek in which the hours actually worked total more than 40 hours and the employee does not receive additional pay for those hours over 40, the excess is defined as compensatory time.
>
> 9.04 All compensatory time accrued by a non-exempt employee prior to April 15, 1985, shall be calculated on a straight time, hour for hour basis, but that compensatory time accrued after April 15, 1985, shall be calculated at the rate of one and one-half (1-½) times per hour. Effective April 15, 1986, said compensatory time balance shall in no event exceed a 240 hour maximum and shall be carried forward indefinitely, and may be used by the non-exempt employee at anytime approved by the employee's supervisor. Further, that portion of an employee's compensatory time balance that exceeds 240 hours and was accrued prior to April 15, 1986, shall not be recognized or acknowledged after April 14, 1986.

(Exhibit 1 to Defendants' Motion for Partial Summary Judgment, R. 135-136).

9. Under these provisions for non-exempt employees, such as the individually named Petitioners, who are all public employees, all hours worked in excess of 40 hours per work week after April 15, 1985 are calculated at the rate of one and one half times per hour up to and including 240 hours. (J.A. 30-31).

10. A non-exempt employee is permitted to "bank" 240 hours of compensatory time off at this rate. Use of such compensatory time is subject to approval by the

non-exempt employee's supervisor. Hours of compensatory time off that are used are deducted from the banked hours. (J.A. 30).

11. Beginning with the payroll period of April 16, 1986, all hours of overtime worked in excess 40 hours per work week and accumulated over the 240 hours banked are compensated in cash at the rate of one and one half times the employee's base pay as set forth on the County Auditor payroll compensation forms. (J.A. 30-31).

12. Each individually named Petitioner signed a County Auditor payroll compensation form which contains a provision that an employee's signature evidences that he or she had read, understood and accepted the terms and conditions of employment recited in the form and in the foregoing personnel regulations. (J.A. 31). (Exhibit 3 to Defendants' Motion for Partial Summary Judgment, R. 143-147).

13. Contending that the Respondent County's method of providing overtime compensation to non-exempt employees contravened The Fair Labor Standards Amendments Act of 1985, Petitioners initiated suit in the Houston Division of the United States District Court for the Southern District of Texas on April 15, 1988. (J.A. 3-14).

14. Following the filing of cross motions for summary judgment, the District Court entered summary judgment for Respondents, holding that the Respondents' method of compensating deputy sheriffs for overtime through the use of compensatory time did not contravene the provisions of 29 U.S.C. §207(o). (Pet. App. 16a-21a). Rejecting the rationale offered by Petitioners based upon

the decision of the Court of Appeals for the Tenth Circuit in *Local 2203, International Ass'n Firefighters v. West Adams County Fire Dist.*, 877 F.2d 814 (10th Cir. 1989), holding that clause (i) of §207(o)(2)(A) applied exclusively when public sector employees appointed a representative, the District Court reasoned that the provisions of Tex. Rev. Civ. Stat. Ann. art. 5154c prohibited Respondents from collectively bargaining with the individually named Petitioners' designated representative. (Pet. App. 19a-20a). The District Court found that this statutory prohibition triggered the application of the provisions contained in clause (ii) of §207(o)(2)(A), which allows the use of compensatory time by public sector employers in instances where the provisions of clause (i) do not apply. (Pet. App. 19a).

15. The United States Court of Appeals for the Fifth Circuit affirmed in *Moreau v. Klevenhagen*, 956 F.2d 516 (5th Cir. 1992) (Pet. App. 1a-14a). This Court granted certiorari on October 5, 1992, in ___ U.S. ___, 113 S.Ct. 51 (1992).

SUMMARY OF ARGUMENT

1. The Fifth Circuit's decision is correct and should be affirmed. 29 U.S.C. §207(o)(2)(A) is not ambiguous, and the plain language of this statute controls its construction. "The reference in subsection (2)(A)(ii) to 'employees not covered by subclause (i)' can only be to employees who are not the subjects of an agreement between their [county governmental employer] and their representative." *Wilson v. City of Charlotte, N.C.*, 964 F.2d

1391, 1397 (4th Cir. 1992) (*en banc*) (Luttig, J. concurring). When this Court finds that the terms of a statute are unambiguous, judicial inquiry is complete. *Burlington N.R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987).

2. The plain meaning of 29 U.S.C. §207 (o)(2)(A) is clear and results in the conclusion that, in the absence of an agreement or understanding being reached between a governmental employer and the representative of employees providing for the use of compensatory time in lieu of cash, the employer may, as authorized by clause (ii), compensate its employees for overtime with compensatory time through individual agreements arrived at between the employer and employee before the performance of the work. Although, when this Court finds that the terms of a statute are unambiguous, "judicial inquiry is complete," *Burlington*, 481 U.S. 454, 461 (1987), " . . . any lingering doubt as to its proper construction may be resolved by examining the legislative history of the statute . . . . " *United States v. Clark*, 454 U.S. 555, 561 (1982). An examination of the legislative history of Section 7(o)(2)(A) of the FLSA, to determine the existence of a legislative intent contrary to the plain words of that statute, reveals that the Senate Committee Report is more congruent with the plain words used. Under this Court's decisional authority in construing amendments to the FLSA, the legislative history of the body in which the enacted statute originates is deemed the more persuasive. *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956). The Senate Committee interpretation of S. 1570, the original Bill, therefore supports the plain meaning of the enactment and further supports the conclusion that when no agreement or understanding has been reached between the employer and the representative of the employee, the county governmental employer may compensate its employees with compensatory time in accordance with individual agreements arrived at between the employer and employee.

3. Petitioners' main contention in their brief on the merits is that under 29 U.S.C. §207(o)(2)(A)(i), when state or local government employees merely designate a representative, the state or local government employer must either reach an agreement or understanding with the representative with respect to compensatory time, or pay cash for overtime. Not only does this interpretation go against the plain meaning of the statute as well as the legislative history, the interpretation is untenable as it ignores state statutes governing the employment relationships of state and local governments with their employees. Under Petitioners' proposed interpretation of Section 7(o)(2)(A), that statute would, in effect, preempt state enactments governing employee relations between states, cities or counties and their employees when they wish to use compensatory time in lieu of cash.

Consideration of whether an Act of Congress preempts state laws "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress". . . . *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987). Section 1 of Article 5154c[2], a Texas Statute enacted in 1947, declares it "to be against the public policy of the State of Texas for any official or group of officials of the State [or] of a County . . . to enter into a collective bargaining contract with a labor organization respecting the wages, *hours* or conditions of employment of public employees . . . " (*emphasis supplied*). Section 2 of Article 5154c states that "[i]t is declared to be against the public policy of the State of Texas for any such official or group

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[2] Tex. Rev. Civ. Stat. Ann. art. 5154c (Vernon 1987).

of officials to recognize a labor organization as the bargaining agent for any group of public employees." These sections are not in conflict with 29 U.S.C. §207(o)(2)(A). Respondent Harris County and Petitioners have complied with 29 U.S.C. §207(o)(2)(A)(ii) by having already entered into individual agreements before the performance of work. Section 5 of Article 5154c-1[3], known as the Fire and Police Employee Relations Act, allows for the holding of an election to adopt the Act. Were such an election to be held where a majority of the votes cast favored the adoption of the Act, the Petitioners could then, pursuant to the Act, organize and bargain collectively with Respondent employer. This Act also does not conflict with 29 U.S.C. §207(o)(2)(A).

Finally, the Secretary of Labor's regulations do not weigh against the plain meaning interpretation of 29 U.S.C. §207(o)(2)(A). The Secretary has stated "[i]t is the Department's intention that the question of whether employees have a representative for purposes of FLSA section 7(o) *shall be determined in accordance with state or local law and practices.* 52 Fed. Reg. 2014-2015 (1987) (emphasis supplied).

ARGUMENT

I.

THE LANGUAGE OF SECTION 7(o)(2)(A) OF THE FAIR LABOR STANDARDS ACT, AS AMENDED, IS NOT AMBIGUOUS, BUT RATHER, CLEAR AND UNEQUIVOCAL

In their brief on the merits, Petitioners, relying upon the reasoning contained in the opinion of the Court of Appeals

[3] TEX. REV. CIV. STAT. ANN. art. 5154c-1, §5 (Vernon 1987).

for the Tenth Circuit in *Local 2203, International Ass'n of Firefighters v. West Adams County Fire Dist.*,[4] argue that the provisions contained in Section 7(o)(2)(A) of The Fair Labor Standards Act of 1938 (the FLSA) are ambiguous and therefore require judicial inquiry into the intent of Congress in enacting that particular subsection. (Brief for Petitioners at p. 10). In particular, quoting from the *West Adams* opinion, Petitioners state: "it is unclear whether [the phrase 'employees not covered by subclause (i)'] means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative".[5] (*Id.*)

The Petitioners' and Tenth Circuit's conclusion that an ambiguity exists in the language of the Congressional enactment contravenes this Court's well established commitment to the contrary principle that, "[i]n short, the plain language of [a statute] controls its construction, at least in the absence of 'clear evidence' . . . of a 'clearly expressed legislative intention to the contrary' " . . . *Bread Political Action Comm. v. Federal Election Comm.*, 455 U.S. 577, 581 (1982). The principle has also been enunciated thus: "[u]nless exceptional circumstances dictate otherwise, '[w]hen [this court] find[s] the terms of a statute unambiguous, judicial inquiry is complete.' " *Burlington N.R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Hence, this Court has noted that:

> Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' *the language of the statute itself 'must ordinarily be regarded as conclusive.'* "

[4] 877 F.2d 814 (10th Cir. 1989).

[5] 877 F.2d 816-17.

Burlington, 481 U.S. at 461 (quoting *United States v. James*, 478 U.S. 597, 606 (1986)) (emphasis added). *See also Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Under this Court's prescribed method for analyzing congressional enactments, the plain language of subclauses (i) and (ii) of Section 7(o)(2)(A) and the interposition of a disjunctive article between them serve to clearly define the two instances in which a state, city, county or local governmental body may compensate their non-exempt employees for overtime hours through the use of compensatory time in lieu of cash. In the first instance, subclause (i) provides that a state or local governmental entity may do so "pursuant to" the terms of "a collective bargaining agreement, memorandum of understanding or any other agreement" between the governmental entity and employees' representative. 29 U.S.C. §207(o)(2)(A)(i). Subclause (ii) of Section 7(o)(2)(A) provides that where employees "are not covered" by the instances enumerated in subclause (i), *i.e.*, by the terms of a collective bargaining agreement, memorandum of understanding or any other agreement between the governmental employer and the employees' representative providing for compensatory time in lieu of cash, the state or local governmental body may utilize compensatory time pursuant to "an agreement or understanding" between it and the employee prior to the performance of the work. 29 U.S.C. §207(o)(2)(A)(ii).

Both the Court of Appeals below and the Court of Appeals for the Eleventh Circuit, following this Court's clear command to accord the words of congressional enactment their plain meaning, have found no ambiguity

in the provisions of Section 7(o)(2)(A). (Pet. App. 5a). In particular, the Court of Appeals below found that the Eleventh Circuit's reasoning and decision in *Dillard v. Harris*[6] was "instructional in the disposition of the case." (*Id.*) In *Dillard*, the Court of Appeals for the Eleventh Circuit noted: "the statute on its face is plain and the legislative history does not mandate a contrary interpretation." 885 F.2d at 1552.

The most cogent application of this Court's plain meaning rule in construing Section 7(o)(2)(A), however, is not contained in the majority opinion of any Court of Appeals, but rather in the concurring opinion to the *en banc* decision of the Court of Appeals for the Fourth Circuit in *Wilson v. City of Charlotte, N.C.*[7] Agreeing with the Court's holding that a state statutory proscription against collective bargaining by public sector employees makes the provisions of subclause (i) of Section 7(o)(2)(A) inapplicable and, as a consequence, triggers the application of subclause (ii) of Section 7(o)(2)(A), a member of that Court reasoned thus:

> The statute [29 U.S.C. §207(o)(2)(A)] is not at all ambiguous . . . . The reference in subsection (2)(A)(ii) to "employees not covered by subclause (i)" can only be to employees who are not the subjects of an agreement between their agency and their representative. It cannot grammatically (and does not logically) refer to employees who are unrepresented because the compound objects of the prepositional phrase

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[6] 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 210 (1990).

[7] 964 F.2d 1391 (4th Cir. 1992) (*en banc*).

> "pursuant to" in subsection (i) are the forms of agreement. The subsection does not denominate a class of represented employees; it identifies certain agreements (in addition to those in subsection (ii)) that will satisfy the requirement in subsection (2)(A) [of Section 7(o)] that compensatory time be provided pursuant to an agreement.

Wilson v. City of Charlotte, N.C., 964 F.2d 1391, 1397 (4th Cir. 1992) (*en banc*) (Luttig, J. concurring) (citation omitted).

Under this reasoning, the plain meaning of the words contained in the statute clearly compel a finding of no ambiguity.

II.

THE PLAIN MEANING OF SECTION 7(o)(2)(A) OF THE FAIR LABOR STANDARDS ACT IS NOT CONTRAVENED BY A CLEARLY EXPRESSED LEGISLATIVE INTENTION TO THE CONTRARY

Petitioners, contending in their brief that Respondents' view of Section 7(o)(2)(A) is contrary to the statute's legislative history, essentially argue against the use of this Court's plain meaning doctrine to interpret Section 7(o)(2)(A). (Petitioner's Brief pp. 21-22). When their argument is couched in terms of the corollary to this Court's plain meaning doctrine, they are in effect arguing that examination of congressional intent in enacting Section 7(o)(2)(A) reveals a meaning contrary to the very words Congress used in the statute itself. Basing their argument on the House Committee Report, they assert that when employees designate a representative, the FLSA requires

a public employer's recognition of that representative rather than recognition and an attendant agreement between the state or local government employer and employee representative as preconditions to the use of compensatory time in lieu of cash. (Brief for Petitioners pp. 14-15). Petitioners further argue that even the Senate Committee Report supports the existence of a statutory ambiguity because of the existence of a congressional intent contrary to the plain words of the statute. (Brief for Petitioners at p. 22).

A more logical reading of the Senate Report cited by Petitioners, however, compels a contrary conclusion.

Petitioners' quotation of the Senate Committee's Report on The Fair Labor Standards Amendments Act of 1985 omits the very first line of the portion of the report addressing agreements or understandings for the payment of compensatory time by states and local governments. The report, including the section omitted by the Petitioners, reads as follows:

> The use of comp time in lieu of pay must be pursuant to some form of agreement or understanding between the employer and employee, reached prior to the performance of the work. Where employees have a recognized representative, the agreement or understanding must be between that representative and the employer, either through collective bargaining or through a memorandum of understanding or other type of agreement. Where employees do not have a recognized representative, the agreement or understanding must be between the employer and the individual employee.

S. Rep. No. 159, 99th Cong., 1st Sess. 10 (1985).

Petitioners' interpretation of this Committee Report would have this Court read the report as stating that where employees have recognized a representative, the agreement for compensatory time must be between the public sector employer and the representative. The juxtaposition of the words "a" and "recognized" does not appear in the text of the Senate report. Thus, the phrase "where employees have recognized a representative" is necessary to the Petitioners' argument. Instead of using that phrase, Congress uses the phrase "where employees have a recognized representative." The Senate Committee's use of this phrase supports Respondents' position that there is an absence of a legislative intent contrary to the plain words it used in Section 7(o)(2)(A). Nowhere in the statute do the words "designate a representative" appear, which phrase is crucial to the Petitioners' interpretation of the statute.

Respondents contend that the more reasonable reading of the Senate Committee Report requires fulfillment of two conditions for the payment of compensatory time to employees under the terms of subclause (i) of Section 7(o)(2)(A): first, the employer's recognition of the employees' representative; second, an agreement or understanding between the governmental employer and the representative it recognizes. In the absence of both conditions, the provisions of subclause (ii) rather than subclause (i) of Section 7(o)(2)(A) control.

Petitioners also rely heavily upon the language in the House of Representatives Committee Report on H.R. 3530. In effect they state that the House Report creates a congressional intent contrary to the plain words of Section 7(o)(2)(A). They argue that the intent of Congress in

construing Section 7(o)(2)(A) must be derived from this committee report rather than the report of the Senate Committee on S. 1570, the Senate version of the bill which was eventually enacted as Section 7(o)(2)(A) of the FLSA. (Petitioners' Brief at pp. 14-15, 22). The House Committee Report states, in relevant part, that where the public employees have designated a representative, the agreement must be with the employees' designated representative rather than the individual employees. H.R. Rep. No. 331, 99th Cong., 1st Sess. 20 (1985). Their reliance upon the House Committee Report is, however, misplaced. This Court has held, in construing the Portal to Portal Amendments to the FLSA[8], that where the House history of an enactment conflicts with that of the Senate, the history of the body in which the enacted bill originated is deemed to be more persuasive. *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956).

Here, the Senate Bill, S. 1570, containing the House Amendments relating to compensatory time limits, substitute employment, protections against discrimination, payment for unused compensatory time upon termination of employment and liability of possessions and territories for violations of overtime is the bill which was ultimately enacted into The Fair Labor Standards Amendments of 1985. *See* H.R. Rep. No. 357, 99th Cong., 1st Sess. 2 (1985). The language contained in the original Senate Bill, S. 1570, is virtually identical to that used in Section 7(o)(2)(A). *See* S. Rep. No. 159, 99th Cong., 1st Sess. 2, 20 (1985). Hence, under this Court's reasoning in *Steiner*, the

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[8] 29 U.S.C. §252.

Senate Committee interpretation of the original enactment is clearly entitled to more deference in determining whether a legislative intent contrary to the actual words of the enactment exists. At least one Court of Appeals in applying this analysis found no legislative intention contrary to the plain words used in Section 7(o)(2)(A). *Dillard v. Harris*, 885 F.2d 1549, 1552 (11th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 210 (1990).

The reasoning employed by the Court of Appeals for the Eleventh Circuit in *Dillard* is by far the most congruent with this Court's plain meaning rule.

III.

THE PETITIONERS' PROPOSED INTERPRETATION OF SECTION 7(o)(2)(A) OF THE FAIR LABOR STANDARDS ACT WOULD EFFECTIVELY PREEMPT STATE STATUTORY ENACTMENTS GOVERNING EMPLOYMENT RELATIONSHIPS BETWEEN STATES OR LOCAL GOVERNMENTS AND THEIR EMPLOYEES IN INSTANCES IN WHICH EMPLOYEES UNILATERALLY DESIGNATE A REPRESENTATIVE

Petitioners' main contention in their brief on the merits is that, under Section 7(o)(2)(A)(i), when employees of a public sector employer such as a state, city and county designate a representative to reach an agreement with respect to compensatory time, their designation of the representative rather than the existence of an agreement between the employee representative and the public sector employer governs when compensatory time may be paid in lieu of cash. (Petitioners' Brief at p. 9). Stated in other terms, Petitioners argue that under the

FLSA Amendments of 1985, when state or local government employees designate a representative, the state or local government has only two choices: either recognize the representative and reach an agreement for the use of compensatory time, or pay cash for overtime at the rate prescribed by the FLSA. (*Id.*).

In addition to ignoring the plain meaning of the words Congress used in Section 7(o)(2)(A), this proposed interpretation ignores the state statutes governing the employment relationships of state and local governments with their employees, and more importantly, this Court's recently stated principles regarding the preemptive effect to be accorded to congressional enactments.

A. In Enacting The Fair Labor Standards Amendments Act of 1985, Congress Did Not Intend to Entirely Preempt the Area of a State or Local Government's Relationship With Its Employees By Requiring Employer Recognition of Employee Representatives as a Precondition to the Use of Compensatory Time

This Court has had recent occasion to reemphasize the principles governing the preemptive effect to be accorded Acts of Congress under the Supremacy Clause of the United States Constitution[9], by stating:

> Consideration of issues arising under the Supremacy Clause "start[s] with the assumption that the historic police powers of the States [are]

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[9] U.S. Const. Art. VI cl. 2.

> not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress" . . . .
>
> Accordingly, " '[t]he purpose of Congress is the ultimate touchstone' " of pre-emption analysis . . . .
>
> Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." . . . In the absence of an express congressional command, state law is preempted if that law actually conflicts with the federal law, . . . or if federal law so thoroughly occupies a legislative field " 'as to make reasonable the inference that Congress left no room for the States to supplement it.' "

Cipollone v. Liggett Group, ___ U.S. ___, 112 S.Ct. 2608, 2617 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978); *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Pacific Gas & Elec. Co. v. Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 204 (1983); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982). Here, because the FLSA and the 1985 Amendments contain no express preemption clause, the Court must first examine the Congressional purpose in enacting the 1985 Amendments to determine whether it intended for the Amendments to occupy entirely the field of a state or local government's relations with its employees or supplant state or local legislative enactments governing a state, city or county employer's relations with its employees.

The Senate Committee Report on S. 1570, the bill eventually enacted into the FLSA Amendments Act of

1985, provides this Court with a beginning point. Particularly significant are the Committees' comments on the need for the enactment of the Amendments. The Committee states in relevant part:

> The rights and protections accorded to employees of the Federal government and the private sector also are extended to employees of states and their political subdivisions.
>
> At the same time, it is essential that the particular needs and circumstances of the States and their political subdivisions be carefully weighed and fairly accommodated. As the Supreme Court stated in *Garcia*, "the States occupy a special position in our constitutional system." Under that system, Congress has the responsibility to ensure that federal legislation does not undermine the States' "special position" or "unduly burden the States." In reporting this bill, the Committee seeks to discharge that responsibility and to further the principles of cooperative federalism . . . .
>
> The Committee also is cognizant that many state and local government employers and their employees voluntarily have worked out arrangements providing for compensatory time-off in lieu of pay for hours worked beyond the normally scheduled workweek. These arrangements – frequently the result of collective bargaining – reflect mutually satisfactory solutions that are both fiscally and socially responsible. To the extent practicable, we wish to accommodate such arrangements.

S. Rep. No. 159, 99th Cong., 1st Sess. 7, 8 (1985).

The House Report on H.R. 3530 contains practically identical manifestations of congressional deference to the "principles of cooperative federalism" and "the particular needs and circumstances of the states and their political subdivisions." *See* H.R. Rep. No. 331, 99th Cong., 1st Sess. 17 (1985).

The Congress' explicit exemption of states and local governments from the operation of the provisions of the National Labor Relations Act,[10] governing an employer's recognition of employee representatives and the duty to bargain in good faith, provides yet another expression of that legislative body's intention to leave the subject of employment relations between states or their political subdivisions and their employees to the province of state lawmakers.[11] *See NLRB v. Natural Gas Util. Dist. of Hawkins County*, 402 U.S. 600 (1971).

Under Petitioners' strained interpretation of Section 7(o)(2)(A) of the FLSA, if a state or political subdivision desired to compensate its employees with compensatory time for overtime hours worked, it would be required to recognize the employee's designated representative and bargain with that representative and reach an accord with respect to overtime compensation, in spite of clear congressional expressions to the contrary.

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[10] The National Labor Relations Act (the NLRA) is codified in 29 U.S.C. §§141-187.

[11] Section 2 of the NLRA provides in relevant part:
> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, *but shall not include . . . any State or political subdivision thereof* . . . . 29 U.S.C. §152(2). (emphasis supplied).

B. The Provisions of Tex. Rev. Civ. Stat. Ann. art. 5154c Do Not Conflict With Section 7(o)(2)(A) of The Fair Labor Standards Act, But Rather Can Be Read Together

The preemption doctrine set forth *ante* at pp. 19-20 requires this Court's analysis of the particular state enactment to determine whether it conflicts with the congressional enactment in question. This Court has stated:

> If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.
>
> *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 581 (1987) (*citing Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963)); *Hines v. Davidovitz*, 312 U.S. 52, 67 (1941); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

Section 1 of Article 5154c expressly declares it . . . "to be against the public policy of the State of Texas for any official or group of officials of the State, or of a County, City, Municipality or other political subdivision of the State, to enter into a collective bargaining contract with a labor organization respecting the wages, *hours* or conditions of employment of public employees . . . " Tex. Rev. Civ. Stat. Ann. art. 5154c, Sec. 1 (Vernon 1987). Section 2 of that statute declares that recognition of a labor

organization as the bargaining agent for employees is also contrary to the state's public policy. *Id.* §2.

Section 6 of the Act provides that employees may present grievances through a representative. *Id.* §6.

This state statute has been construed by the Texas courts as allowing unions as representatives of public sector employees to present unilateral grievances while at the same time forbidding a public entity's recognition of a labor organization and the reaching of an attendant bilateral agreement between that labor organization and the public employer. *Dallas Indep. Sch. Dist. v. Local 1442, American Fed'n of State, County and Mun. Employees,* 330 S.W.2d 702 (Tex. Civ. App. – Dallas 1959, writ ref'd n.r.e.) (*citing Beverly v. City of Dallas,* 292 S.W.2d 172 (Tex. Civ. App. – El Paso 1956, no writ)).

Under the provisions of Section 5 of Article 5154c-1, known as The Texas Fire and Police Employee Relations Act, firefighters and police officers may organize and collectively bargain with their government employer upon an affirmative adoption of the Act's provisions pursuant to an election.

This Court must determine under the test set forth above, whether there is a conflict between the "no recognition no contract" clauses of Art. 5154c and the plenary provisions of Section 207(o)(2)(A). Respondents submit that there is not.

Here, under this state enactment, Respondent County and Respondent Sheriff are unable to recognize or reach an agreement with an employee representative for the use of compensatory time without the approval of voters.

However, they may lawfully compensate their employees with compensatory time in lieu of cash under Section 7(o)(2)(A)(ii) of the FLSA. Thus, under this court's pre-emption test, a state, city or county may easily comply with both the prohibitions contained in Article 5154c and the requirements of Section 7(o)(2)(A) of the FLSA for the payment of compensatory time in lieu of cash by reaching an agreement with the individual employee under subclause (ii).

Petitioners argument that employee recognition of a representative under subclause (i) precludes the payment of compensatory time absent an agreement also serves to give preemptive effect to those state enactments which, like the NLRA, would require public employees to elect an exclusive bargaining representative, to bargain in good faith, and which contain provisions for the filing of unfair labor practices complaints with the appropriate state agency.[12]

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[12] After reviewing applicable State statutes, Respondents have found that forty jurisdictions have statutes that mandate either collective bargaining or good faith "meet and confer" negotiations between the State and local governments or political subdivisions thereof and at least one distinguishable group of public employees or their representatives. Those states are Alabama, Alaska, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Vermont, Washington, Wisconsin and Wyoming. Two states, Arizona and Arkansas, have statutes that permit, but do not mandate, collective bargaining between the governmental unit and at least one distinguishable group of

(continued on next page)

C. The Federal Regulations Governing the Use of Compensatory Time Were Not Intended to Contravene State Enactments

In its original uncodified version, the FLSA Amendments Act of 1985 directed that the Secretary of Labor promulgate regulations to implement the Act's provisions. In particular, Congress stated:

> The amendments made by this Act shall take effect April 15, 1986. The Secretary of Labor shall, before such date, promulgate such regulations as may be required to implement such amendments.

Pub. Law 99-150, 99 Stat. 790 §6 (1985).

The Secretary of Labor promulgated the final version of these regulations on January 16, 1987. The regulation

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(continued from previous page)

public employees or their representative. Two states, Mississippi and Utah, have no statutes speaking to the issue of collective bargaining rights of public employees. Two states, South Carolina and Tennessee, have statutes providing for public employee grievance procedures. Virginia has no statutory provision addressing collective bargaining rights for public employees. However, Virginia's Attorney General has issued an opinion forbidding collective bargaining with public employees. West Virginia has no statute addressing collective bargaining rights for public employees, but its Attorney General has issued an opinion mandating meet and confer negotiations. North Carolina has a statute that forbids any collective bargaining with public employees. Nevada has a statute that prohibits collective bargaining representation on behalf of State employees unless the representative is recognized by the State, in which case collective bargaining becomes mandatory. *See* [4 & 4A State Laws] Lab. Rel. Rep. (BNA); *See also* RICHARD C. KEARNEY, LABOR RELATIONS IN THE PUBLIC SECTOR, pp. 53-73 (Marcel Dekker 1984).

which governs the use of agreements to provide compensatory time in lieu of cash states in relevant part:

> *Agreement or understanding between the pubic agency and a representative of the employees.* (1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. Any agreement must be consistent with the provisions of section 7(o) of the Act.

29 C.F.R. §553.23(b).

Section 553.23(c) states:

> *(c) Agreement or understanding between the public agency and individual employees.* (1) Where employees of a public agency do not have a recognized or otherwise designated representative, the agreement or understanding concerning compensatory time off must be between the public agency and the individual employee and must be reached prior to the performance of work. This agreement or understanding with individual employees need not be in writing, but a record of its existence must be kept.

29 C.F.R. §553.23(b). While at first glance the words of these regulations may seem to support Petitioners position that employee designation of a representative precludes an individual agreement under subclause (ii) of

Section 7(o)(2)(A), the Secretary of Labor, addressing the spectre of giving preclusive effect to these regulations, stated thus:

> The State of Missouri expressed concern that where employee representatives have no authority to bargain enforceable agreements, the proposal accords greater legal status to employee representatives than is possible under State law. They suggested that "recognized representative" mean [sic] an organization designated by the employees under a State's comprehensive collective bargaining statute, but not to include organizations covered by "meet and confer" statutes.
>
> The Department believes that the proposed rule accurately reflects the statutory requirement that a CBA, memorandum of understanding or other agreement be reached between the public agency and the representative of the employees where the employees have designated a representative. Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention *that the question of whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with State or local law and practices.*

52 Fed. Reg. 2014-2015 (1987). (emphasis supplied).

Hence, despite the literal words of the regulation there is a manifest intention of the Department to construe the agreement with a representative clause under

subclause (i) of Section 7(o)(2)(A) in accordance with state law.

Even if this court were to assume that the regulations promulgated by The Secretary of Labor are consistent with the Petitioners' position that employee designation of a representative compels a public employer's recognition of an employee representative and an attendant agreement to pay compensatory time as the only alternative to the payment of cash under the FLSA, such regulations would contravene the stated intent of congress not to preempt the states' authority to regulate labor relations not explicitly addressed by or in conflict with the amendments. As this Court has stated:

> On a pure question of statutory construction, our first job is to try to determine congressional intent, using "traditional tools of statutory construction". If we can do so that interpretation must be given effect and the regulations at issue must be fully consistent with it.

NLRB v. Local 23, Amalgamated Food and Commercial Workers, 484 U.S. 112 (1987) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987)). *See also Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837 (1984).

Here, if the regulations were construed as the Petitioners contend, they would clearly contradict both the plain words used in the statute and the congressional intent of the statute by invalidating both state proscriptions against the recognition of employee representatives

and state laws which govern the procedures for the recognition of employee representatives.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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